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No. 83-1123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHRISTINE VAN WEY, - - - - Petitioner

versus

RAYMOND F. O'NEAL,
DONNA O'NEAL and
BABY BOY VAN WEY, - - - - Respondents

BRIEF FOR THE RESPONDENT, BABY BOY VAN WEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

When it has been determined by the Trial Court that a natural parent had voluntarily petitioned to terminate her parental rights, and a hearing in accordance with the Kentucky statute regarding voluntary terminations has been duly held, should the United States Supreme Court entertain an appeal based on the Due Process Clause of the Fourteenth Amendment absent claims below by Petitioner that the statute is constitutionally invalid or the special presentation by Petitioner of other federal constitutional issues to the Kentucky courts.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1123

CHRISTINE VAN WEY - - - - *Petitioner*

v.

RAYMOND F. O'NEAL
DONNA O'NEAL
BABY BOY VAN WEY - - - *Respondents*

BRIEF FOR THE RESPONDENT, BABY BOY VAN WEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

STATEMENT OF THE CASE

A. Material Facts

The record establishes that in November, 1980, Christine Van Wey was a resident of Muscatine, Iowa. She was approximately seven (7) months pregnant and the mother of two daughters, ages 5 and 7 years. Ms. Van Wey, separated from her husband, Stanley Van Wey, had been living with a John Adler at some point during her pregnancy with the child, Baby Boy Van Wey. According to her testimony, Mr. Adler deserted Van Wey during her fifth month of pregnancy. Although she stated in her sworn Petition for Voluntary Termination of Parental Rights that the natural father of the child was unknown. Van Wey later testified that Mr. Adler was, in fact, the child's natural father.

Feeling unable to provide for her two daughters, Van Wey wrote Attorney Katie Brophy (after having viewed a television program on which Ms. Brophy had appeared) soliciting her aid in placing the unborn child for adoption in Kentucky. Receiving no response from Ms. Brophy, Van Wey placed a telephone call to Ms. Brophy's office and spoke with her secretary, Sandra Hafer. Van Wey then drove to Louisville from Iowa to deliver the unborn child and place the child for adoption.

In Louisville, formal steps were taken by Van Wey to place her unborn child for adoption. She executed a consent to adoption. In addition, she made application to the Kentucky Department for Human Resources to place the unborn child for adoption and confirmed this application at a meeting with an adoptions worker employed by the Department. Van Wey's application to place the child was approved and the O'Neals (Respondents herein) did receive the child (and have since adopted the child).

Subsequently, Van Wey filed a Petition for Voluntary Termination of Parental Rights in the Jefferson Circuit Court of Kentucky (Petitioner's Appendix D). A hearing was held by Judge Jack E. Mudd, Jefferson Circuit Court Judge, on Van Wey's Petition to voluntarily terminate her parental rights. In its Opinion and Order, that Court found that Van Wey had satisfied the Court that she understood the nature of the proceedings and that she voluntarily wanted to terminate her parental rights for the purpose of having her child adopted. (See Page 45a, Petitioner's Appendix N).

A Petition for Immediate Entitlement and Custody was later filed on behalf of Van Wey on April 30, 1981 —greater than three months after the child was placed in the O'Neals' home on January 24, 1981. (Petitioner's Appendix E). This Petition was buttressed by Van Wey's claims that she had executed the Petition to Voluntarily Terminate (her) Parental Rights under extreme emotional duress and had been coerced to appear and testify at the hearing on her Petition. However, after a full-scale hearing, the trial court concluded that Van Wey's Petition and actions were voluntary and not the product of duress or coercion. (Petitioner's Appendix N).

B. Federal Questions Raised Below

By the admissions contained in the Petition for a Writ of Certiorari filed herein by Van Wey, the Kentucky Courts did not address a federal question or questions in the proceedings below. This result is consistent with the record below which establishes that Van Wey simply failed to properly raise and press before the Courts of Kentucky any federal question in the context of this case.

In her Petition for Writ of Certiorari, Petitioner states that she raised constitutional issues before the Kentucky Courts. An examination of the record and the assertions in her Petition establishes that Petitioner did not present with fair precision, nor press for resolution, a claim under the Fourteenth Amendment to the United States Constitution or any other federal constitutional claim.

At the trial court, Petitioner's reference to a "due process" hearing was merely an argument that Kentucky statutory provisions found in KRS 199.603 (see Petitioner's Appendix T) require a fitness hearing before parental rights are *involuntarily* terminated. (Record at 166-176; set out in Respondent O'Neals Appendix). The trial court record, however, is devoid of any reference to a federal constitutional question relating to "due process" or "due process rights." Petitioner's argument was, instead, predicated upon a statutory provision relating to involuntary terminations which was rendered inapplicable by the trial court's findings that the Petition to Terminate was voluntary and, thus, controlled by the statutory provisions contained in KRS 199.601, the *voluntary* termination statute. (Petitioner's Appendix T). It is, moreover, undisputed that a hearing was properly held pursuant to the voluntary termination statute. (See Petitioner's Appendix N). It is also clear that that statute, KRS 199.601, has not been claimed by Petitioner to be constitutionally invalid.

Petitioner next alleges that she presented a federal question to the Kentucky Court of Appeals. Simply stated, this was not done. The reference in her Petition filed herein is to a one paragraph statement citing *Stanley* v. *Illinois,* 405 U. S. 645 (1972). As can be seen from the record, Petitioner's argument was that the trial court abused its discretion by terminating parental rights without a fitness hearing required by KRS 199.603—essentially, the same argument advanced by Petitioner in the trial court. Again, the state trial

court had found that the cited Kentucky statute was inapplicable, that another statute (KRS 199.601) controlled, and the hearing contemplated by that statute was duly held. An argument predicated upon due process or a right to family integrity was not framed for, nor presented and pressed to, the Kentucky Court of Appeals.

Finally, Petitioner herein asserts that a federal question was presented to the Kentucky Supreme Court. As in her brief to the Kentucky Court of Appeals, the Petitioner vaguely references "due process and equal protection" in the context of an argument that the trial court abused its discretion by allegedly failing to have an additional full hearing on Petitioner's fitness. Again, this argument is predicated on Petitioner's claim that her voluntary petition should be rendered involuntary (and thus KRS 199.603, the involuntary termination statute be applied) as a result of duress and coercion. The trial court had, however, already determined that Van Wey's Petition and actions were not the product of duress or coercion but were voluntary acts.

In summary, Petitioner failed to frame a federal question for resolution by the Kentucky trial or appellate courts. Vague references to due process or equal protection were made only in the context of arguments that the Kentucky involuntary termination statute rather than the Kentucky voluntary termination statute should be applied. The trial court's findings of fact, upheld by the opinion of the Supreme Court of Kentucky, rendered that argument a nullity.

ARGUMENT

I. The Petition for Writ of Certiorari Should Be Denied Because Petitioner Failed to Properly Raise in the Kentucky Courts the Constitutional Issues She Seeks To Have Decided

The Petition for Writ of Certiorari should be denied because the Petition fails to properly raise in the Kentucky Courts the constitutional issues she now seeks to have the Supreme Court decide.

Title 28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Congress has, thus, expressly limited the authority of the Supreme Court to review judgments of the state courts to cases in which a substantial federal question has been properly raised in state court proceedings. Moreover, the Supreme Court has concluded that this limitation is jurisdictional in character. *Cardinale* v. *Louisiana,* 394 U. S. 437, 89 S. Ct. 1161 (1969). Thus, a federal issue not having been specially set up or claimed is cause for denial of a petition for writ of certiorari. *Zucht* v. *King,* 260 U. S. 174, 43 S. Ct. 24 (1922).

The jurisdictional nature of the rule against deciding claims "not pressed nor passed upon" in state court

was reaffirmed by the Supreme Court in *State Farm Mutual Automobile Insurance Co.* v. *Duel,* 324 U. S. 154, 65 S. Ct. 573 (1945). In *Duel,* the Supreme Court advised that,

> . . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere reference but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right. *Oxley Stone Co.* v. *Butler County,* 166 U. S. 648, 17 S. Ct. 709 (1897).

See also *McGoldrick* v. *Campagnie Generale,* 309 U. S. 430, 60 S. Ct. 670 (1940).

This Court has long held that a substantial federal claim must have been asserted in state court and the constitutional or federal basis have been brought to the attention of the state court with fair precision and in due time. *Street* v. *New York,* 394 U. S. 576, 89 S. Ct. 1354 (1969); *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61 (1928). Thus, the issue presented to the Supreme Court for review on a writ for certiorari must have been "pressed or passed on" in the state courts below. *Illinois* v. *Gates,* —— U. S. ——, 103 S. Ct. 2317 (1983); *State Farm Mutual Insurance Co.* v. *Duel, supra.*

In its Petition for Writ of Certiorari filed herein, the Petitioner asserts the following:

> (1) the denial of a liberty interest of a natural parent in the care and custody of his or her

child protected by the Due Process Clause of the Fourteenth Amendment; and

(2) the denial of a fundamental liberty interest of a natural parent in family integrity protected by the Due Process Clause of the Fourteenth Amendment.

Even a curosory review of the record below, however, reveals that the Petitioner did not press the issues presented in her Petition for Writ of Certiorari to the state courts. Mere inference is insufficient. *Oxley Stone Co.* v. *Butler County, supra.* Vague reference to "due process" is insufficient. *Bowe* v. *Scott,* 233 U. S. 658, 33 S. Ct. 769 (1914). *See also* separate opinion of Mr. Justice White in *Brody* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194 (1963).

As reviewed above, the Petitioner herein asserts that she raised a due process issue in three separate presentations to the Kentucky state courts. The record cited by Petitioner clearly establishes that any such presentation was not made with fair precision and, in each instance, was a mere statement made in the context of an argument as to which of two Kentucky statutes should be applied in the resolution of this matter. As admitted in the Petition, not one of the Kentucky Courts addressed or "passed on" the alleged presentation of a constitutional issue or issues. The Supreme Court has consistently held that "when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively

show the contrary." *Street* v. *New York, supra,* 394 U. S. at 582, 89 S. Ct. at 1360; *Bailey* v. *Anderson, supra; Webb* v. *Webb,* 451 U. S. 493, 101 S. Ct. 1889 (1981).

At the trial court level, Petitioner filed a three page Response to a motion filed by the O'Neals (Respondents herein). It is by this document that Petitioner claims to have asserted substantial federal claims at the trial court level. That Response, however, is devoid of any citation of a federal or constitutional basis upon which a claim can be founded. Petitioner rather argues that the Kentucky statute on involuntary terminations which requires a fitness hearing (KRS 199.603) rather than the Kentucky statute on voluntary terminations (KRS 199.601) should be applied. In her Conclusion to that Response, Petitioner stated only that she was ". . . entitled to a hearing pursuant to KRS 199.603." (Record at 166-168). Clearly, no federal question was pressed at the trial court level.

This issue was briefly noted in Petitioner's written arguments to the Kentucky Court of Appeals. However, any discussion was in the context of Petitioner's continuing argument that she was entitled to a fitness hearing in accordance with the provisions of the Kentucky involuntary termination statute. Her argument, entitled "It Was An Abuse of Discretion for the Trial Court to Terminate Appellant's Parental Rights" was concluded with: "Appellant was entitled to an additional full hearing on her fitness before her parental rights were terminated. *Phillips* v. *Horlander,* 535 S. W. 2d 72 (Ky. 1975)." Since the findings of the

trial court were that Petitioner had acted voluntarily and the required statutory hearing on that issue had been held, this argument that the involuntary termination statute required a fitness hearing was irrelevant. At this juncture, Petitioner did state that the "right to family integrity" is a protected liberty instead, but this statement, as stated above, was made in the context of her continuing argument for a fitness hearing. The argument clearly failed to "press" a substantial federal issue.

Finally, the brief of Petitioner to the Kentucky Supreme Court included a reference to due process rights. Again, however, the reference was a legal comment made in the context of Petitioner's renewed argument that the provisions of the Kentucky involuntary termination statute require a fitness hearing.

It is notable that the record is devoid of any claim that either the applicable voluntary termination statute or the involuntary termination statute relied on by Petitioner is constitutionally invalid. Petitioner based her case on the argument that this matter should have been deemed an involuntary termination and, thus, subject to all provisions of that statute. On factual and legal grounds, the Kentucky Courts held otherwise.

In summary, Petitioner failed to specially set up or press a federal constitutional claim in this action. Therefore, her Petition for Writ of Certiorari should be denied for failure to establish jurisdiction in the Supreme Court of the United States. 28 U.S.C. §1257.

II. The Petition for Writ of Certiorari Should Be Denied Because the Judgment Below Is Supported by Adequate and Independent State Grounds

The Supreme Court has consistently held that it will not entertain a Petition for Writ of Certiorari to review a state court judgment based upon an adequate and independent state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U. S. 45, 29 S. Ct. 33 (1908); *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 56 S. Ct. 183 (1935). In this instance, the state court judgment is based upon nonfederal or state grounds which are adequate to support the state court judgment. Thus, the Petition filed herein should not be granted. *Wilson* v. *Lowe's, Inc.,* 355 U. S. 597, 78 S. Ct. 526 (1958). *See also, Herb* v. *Pitcairn,* 324 U. S. 117, 65 S. Ct. 459 (1945).

Three issues were presented at a full-scale hearing held by the state trial court in this matter. As summarized in the Opinion of the Kentucky Supreme Court (Petitioner's Appendix A, Page 5a), the issues were:

(1) Was Ms. Van Wey's consent obtained in the first instance by duress or coercion?

(2) Did Ms. Van Wey have a right to revoke her consent or withdraw her petition at any time before judgment regardless of whether or not her acts were initially voluntary?

(3) Should the question of termination be decided on the basis of the law that relates to voluntary termination, KRS 199.601, or the law that relates to involuntary termination, KRS 199.603?

Having voluntarily petitioned the trial court to terminate her rights and having appeared before that Court and testified confirming her voluntary petition, Van Wey subsequently alleged that her apparent voluntary actions were the product of duress or coercion. The trial court, however, rendered its findings that Van Wey's actions were not coerced but were voluntary. Therefore, provisions of the voluntary termination statute were applicable. A hearing was held by the trial court for the purposes set out in the voluntary termination statute. Acting in its role as the "finder of fact," the trial court determined that Van Wey had voluntarily accomplished the legel steps required to voluntarily terminate her parental rights. The Supreme Court of Kentucky held that the finding of the trial court was ably supported by the record. Thus, properly applying the Kentucky voluntary termination statute, the trial court considered the best interests of the child and ruled accordingly.

Having determined that the Petition to terminate parental rights was voluntary, the Kentucky statute mandated consideration of the best interests of the child. The constitutional validity of this statute has never been questioned by Petitioner.

The Kentucky Supreme Court did address Petitioner's apparent argument that she had an absolute right to change her mind or to revoke her voluntary consent or petition. That Court held that the Petitioner did not have an absolute right to revoke but that such action must be viewed by considering the best interests of the child. Petitioner had voluntarily acted

to terminate her parental rights and place the child with adopting parents. In so doing, Petitioner was acting in accordance with a plan she had developed two months before the child's birth and which was accomplished only by her efforts and travel from Iowa to Kentucky.

Kentucky case law is well established that in the circumstances in which a natural parent has voluntarily relinquished actual permanent custody of the child to another, the natural parent must establish that revocation of consent or return of custody of the child shall not be harmful to the child but, rather, in the child's best interests. *Lee* v. *Thomas,* 297 Ky. 858, 181 S. W. 2d 457 (1944); *Rose* v. *Ledford,* 306 Ky. 662, 208 S. W. 2d 957 (1948); *Shaw* v. *Graham,* 310 S. W. 2d 522 (Ky. 1958); *Warner* v. *Ward,* 401 S. W. 2d 62 (Ky. 1966); *Galilean Children's Home* v. *Ball,* 308 Ky. 319, 214 S. W. 2d 403 (1948); *Higgason* v. *Henry,* 339 S. W. 2d 929 (Ky. 1960). See also *Skaggs* v. *Gannon,* 293 Ky. 795, 170 S. W. 2d 12 (1943); *Williams* v. *Neuman,* 405 S. W. 2d 556 (Ky. 1966); *Paynter* v. *Smith,* 481 S. W. 2d 270 (Ky. 1972). Thus, Kentucky law places the burden on the party that voluntarily relinquished custody of the child to prove that a return of custody is in the best interest of the child. In this instance, Petitioner failed to meet that burden. Moreover, Petitioner did not attack this legal conclusion on federal or constitutional grounds below.

In presenting her Reasons for Granting the Writ, Petitioner advances arguments predicated on constitu-

tional claims directed at (I) the trial court's failure to apply the Kentucky involuntary termination statute and (II) the trial court's application of the voluntary termination statute.

To support her arguments, Petitioner recites that the interest of a natural parent in the care and custody of his or her child is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. This Supreme Court may so hold. *See Santosky* v. *Kramer,* 455 U. S. 745, 102 S. Ct. 1388 (1982) and *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208 (1972). Nevertheless, this "truth" is not affected in the context of the facts in this instance. Petitioner acted voluntarily and in accordance with precise statutory requirements to terminate her parental rights. That statute has not been attacked by Petitioner as constitutionally invalid. It adequately supports the decision of the Kentucky Supreme Court.

In *Quillon* v. *Walcott,* 434 U. S. 246, 98 S. Ct. 549 (1978), the Supreme Court upheld application of a "best interests" standard in the face of an attack as to the constitutional invalidity of Georgia statutory law. Unlike *Quillon,* the Petitioner in this cause had acted to voluntarily terminate her rights. Moreover, the Petitioner in *Quillon,* had attacked the Georgia statutes as violative of Fourteenth Amendment protection. Petitioner herein simply failed to so argue.

Kentucky Courts held that Petitioner did not have an absolute right to "undo" the effects of her long-

range plan and voluntary petition. This holding is consistent with Kentucky case law (cited herein) and *Quillon* v. *Walcott, infra.*

Best interests of the child were properly considered in accordance with Kentucky statutory law and well established case law precedent. (See citations above). The trial court's actions are also consistent with Kentucky procedure. Clay Ky. Prac., 3rd Ed., Civil Rule 41.01. Ky. Rules of Civil Procedure, Rule 41.01. (See Supreme Court Opinion, page 10a, Petitioner's Appendix).

In conclusion, the non-federal grounds supporting the decision of the state court below is sufficiently broad to sustain the state court judgment. Moreover, the non-federal bases are independent of any federal question (assuming, *arguendo,* that any federal question was raised and pressed below). A state court decision resting on adequate and independent state grounds shall not be reviewed by the Supreme Court. *Illinois* v. *Gates, supra; Cardinale* v. *Louisiana, supra.* This rule, consistently applied by the Supreme Court, gives due regard for the "appropriate relationship" of the Supreme Court to state courts. *McGoldrick* v. *Campagnie Generale, supra; Wilson* v. *Loew's, Inc., supra.*

III. Summary

In summary, Petitioner did not specially set up and press any federal constitutional issue in the Kentucky Courts below. The Supreme Court is, therefore,

without jurisdiction to grant the Petition filed herein. Moreover, the opinion of the Supreme Court of Kentucky and below rests firmly on adequate and independent non-federal grounds.

CONCLUSION

For the reasons reviewed in this Brief, the Petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Kentucky should be denied.

Respectfully submitted,

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Guardian Ad Litem

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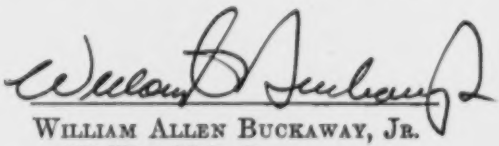
PROOF OF TIMELY FILING

I, William Allen Buckaway, Jr., having been admitted to practice before the Supreme Court of the United States, do hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been timely filed by depositing same in a United States post office or mailbox, with first-class postage prepaid, properly addressed to Hon. Alexander Stevas, Clerk, United States Supreme Court, on February 3, 1984, within the time allowed for filing the Brief, and I, after having been duly sworn, state that the mailing took place at an office of the U. S. Post Office on said date within the time permitted for said filing.



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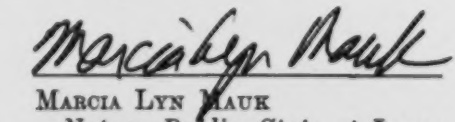
COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed and sworn to before the undersigned, a Notary Public, by William Allen Buckaway, Jr., on this 3rd day of February, 1984.

My commission expires: July 24, 1987.



MARCIA LYN MAUK
Notary Public, State at Large

PROOF OF SERVICE

I, Charles W. Dobbins, Jr., guardian ad litem herein, having first been duly sworn, states that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, first class, postage prepaid, to Ellen G. Friedman and Robert Frederick Smith, Counsel for Petitioner, 425 West Muhammad Ali Boulevard. Louisville, Kentucky, 40202; Irene P. Long, Counsel for Respondent, Route 2, Bedford, Kentucky, 40006; Stephen P. Smith, Jr., Counsel for Respondent, 1526 Kentucky Home Life Building, Louisville, Kentucky, 40202, on this 3rd day of February, 1984. I further state that to my knowledge all parties required to be served have been served. I do further state that I have duly applied for admission to practice before the Supreme Court of the United States and am awaiting notification of action on my application by the Court.

CHARLES W. DOBBINS, JR.
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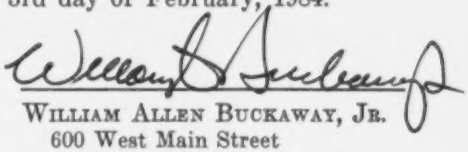
COMMONWEALTH OF KENTUCKY }
COUNTY OF JEFFERSON }

Subscribed and sworn to before the undersigned a Notary Public, by Charles W. Dobbins, Jr., this 3rd day of February, 1984.

My commission expires: July 24, 1987.

MARCIA LYN MAUK
Notary Public, State at Large

I, William Allen Buckaway, Jr., having been admitted to practice before the Supreme Court of the United States, do hereby certify that I have knowledge that the foregoing Affidavit of Service of Charles W. Dobbins, Jr., guardian ad litem herein, is true and correct, and that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were duly mailed to all counsel of record as sworn above on this 3rd day of February, 1984.



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